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9

10  
11 **IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA**  
12 **IN AND FOR THE COUNTY OF SANTA CLARA**

13  
14 SAN JOSE POLICE OFFICERS' ASSOCIATION,

15 Plaintiff,

16 v.

17  
18 CITY OF SAN JOSE AND BOARD OF  
19 ADMINISTRATION FOR THE POLICE AND FIRE  
20 DEPARTMENT RETIREMENT PLAN OF CITY OF  
SAN JOSE,

21 Defendants.

22 AND RELATED CROSS-COMPLAINT  
23 AND CONSOLIDATED ACTIONS

Case No. 1-12-CV-225926

(and Consolidated Actions 1-12-CV-  
225928, 1-12-CV-226570, 1-12-CV-  
226574, and 1-12-CV-227864)

17 **REQUEST FOR JUDICIAL NOTICE IN**  
18 **OPPOSITION TO MOTION FOR**  
19 **SUMMARY ADJUDICATION OF ISSUES**

20 **Date: June 7, 2013**  
21 **Time: 9:00 a.m.**  
**Dept: 2**  
22 **Judge: Hon. Patricia M. Lucas**

23 **Trial Date: July 22, 2013**

1 Pursuant to the provisions of Sections 452 and 453 of the Evidence Code, Plaintiffs  
2 and Cross-Defendants Robert Sapien, *et al.*, (Case No. 1-12-CV-225928), Teresa Harris,  
3 *et al.*, (Case No. 1-12-CV-226570) and John Mukhar, *et al.*, (Case No. 1-12-CV-226574)  
4 request that the court take judicial notice of the of:

5 1. The Amicus Curiae Brief filed on behalf of San Jose Police and Fire  
6 Department Plan by the San Jose City Attorney in the Appellate case of *Claypool v.*  
7 *Wilson*, Third Appellate District Court of Appeal, No. 3 Civ. C011580, attached as Exhibit 1.

8 2. The Public Employment Relations Board Complaint, Case No. SF-CE-969-M  
9 dated March 8, 2013, attached as Exhibit 2.

10 3. The Order Granting Defendant's Motion For Summary Judgment And  
11 Denying As Moot Plaintiff's Motion For Summary Adjudication in *Retired Employees*  
12 *Association of Orange County, Inc. v. County of Orange*, United States District Court,  
13 Central District, Case No. SACV 07-1301 AG, attached as Exhibit 3.

14 4. Plaintiff's Notice Of Appeal From Judgment In Favor Of Defendant; Notice Of  
15 Related Case in *Retired Employees Association of Orange County v. County of Orange*,  
16 United States District Court Central District, Case No. SACV 07-1301 AG, attached as  
17 Exhibit 4.

18 5. The Docket Sheet of United States Court of Appeals, Ninth Circuit, Docket  
19 #12-56706, *Retired Employees Association v. County of Orange*, attached as Exhibit 5.

20  
21 Dated: May 2, 2013

22 WYLIE, McBRIDE,  
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# **EXHIBIT 1**

OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT

PEGGY J. CLAYPOOL, et al.,  
Petitioners,

v.

PETE WILSON, GOVERNOR  
OF THE STATE OF CALIFORNIA,  
et al.,

Respondents.

No. 3 Civ. CO11580

COPY

ON WRIT OF MANDAMUS

BRIEF OF NATIONAL CONFERENCE ON  
PUBLIC EMPLOYEE RETIREMENT SYSTEMS AND  
SAN JOSE POLICE AND FIRE DEPARTMENT  
RETIREMENT PLAN  
AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

PEGGY J. CLAYPOOL, et al.,

Petitioners,

v.

PETE WILSON, GOVERNOR  
OF THE STATE OF CALIFORNIA,  
et al.,

Respondents,

No. 3 Civ. C011580

TO THE HONORABLE ROBERT PUGLIA, PRESIDING JUSTICE AND TO THE  
HONORABLE ASSOCIATE JUSTICES OF THE THIRD DISTRICT COURT OF  
APPEAL:

STATEMENT OF THE CASE

This is an original proceeding in the Third District Court of Appeal, instituted by a Petition for Writ of Mandamus and Request for Stay filed July 30, 1991. Petitioners challenge the constitutionality of Assembly Bill 702, Statutes of 1991, chapter 83, which became effective June 1991, and request a stay order regarding the transfer of actuarial determinations and fiduciary duties to the Governor-appointed actuary.

## INTEREST AND POSITION OF NCCI

The National Conference on Public Employee Retirement Systems (NCPERS) is an organization of some 400 individual member pension funds, comprised of municipal, county, and state pension entities, whose combined representative asset base is approximately \$500 billion and whose membership totals 5 million. NCPERS is an advocate of all representative members in the pursuit and preservation of pension assets for the benefit of plan participants and their beneficiaries. National Conference on Public Employee Retirement Systems, Position Paper on the Hostile Takeover of Public Pension Funds, presented at Sept. 9, 1991 conference in Washington, D.C.

The San Jose Police and Fire Department Retirement Plan (San Jose Plan) is a governmental plan and a member of the National Conference on Public Employee Retirement Systems. The Plan has an asset base in excess of \$588 million and has investments in national and international markets. It has more than 1,800 active public safety members and currently pays retirement and survivorship benefits to over 600 beneficiaries.

On the forefront of current issues impacting the public pension plan industry, none other is more threatening than the raid of pension assets by local and state governments. Both NCPERS and the San Jose Plan have an interest in the correct decision of the issues involving the interpretation and

validity of AB 702 and in that capacity have an interest in assisting the work of this Court.

Amici will address the issue of the dangerous precedent set for all California public pension funds, as well as the approximately 2,000 other retirement systems across the nation, if AB 702 is declared constitutional. In addition, Amici will argue that AB 702 and any similar government action may negatively impact the qualification status of public pension plans under the Internal Revenue Code. Amici also will address the conflict raised by adding to the retirement system's fiduciary duties the necessity of "minimizing employer costs of providing benefits." Mindful of their position as amici, NCPERS and the San Jose Plan will not repeat the constitutional arguments made by Petitioners and the Board of Administration of the Public Employees' Retirement System of the State of California; however, the arguments that follow are premised on those sound and well established constitutional and legal principles, which mandate invalidating AB 702. Amici therefore file this brief in support of the position of the Petitioners.

I. Upholding AB 702 Against Constitutional Challenges Establishes Dangerous Precedent for all Public Employee Pension Plans

A. Overview of Public Employee Retirement Systems

Membership in public pension funds is estimated to be over 15 million. Light, The Power of the Pension Funds, Bus. Wk., Nov. 6, 1989, at 154. There are 11.8 million participants (meaning current workers) and 3.7 million beneficiaries (meaning retirees and their survivors) receiving benefits in the 2,414 public retirement systems in the United States. "Employment Retirement Systems of State and Local Governments," Table 9 in 4 Government Finances (1987 Census of Governments, issued Dec. 1989). With accumulated assets of over \$720 billion, these retirement system funds are increasingly being looked to as a source of revenue by financially strapped states and local governments. Lantry & Williams, Contract Theory Prevents Government Raid on Pension Fund, at p. 1, to be published in N. Atl. Reg. Bus. L. Rev. (1991); see also "Employment Retirement Systems of State and Local Governments," supra, at Table 9. While assets of over \$500 billion seems huge, it translates into an average of \$7,402 annually for each of the 3.7 million retirees. "Employment Retirement Systems of State and Local Governments," supra, at "Findings," p. XII (based on 1987 figures).

Recently, a subcommittee of the House Committee on Education and Labor undertook a study of the issue of control over public employment pension plans. House of Representatives Committee on Education and Labor, Public Pension Plans: The Issues Raised Over Control of Plan Assets, p. vi (U.S. Gov't Printing Office 1990) (not officially adopted by committee or subcommittee). The Committee report concluded that over the last ten years, concerns regarding public pension plans have shifted from funding inadequacy to control of the \$720 billion in assets held in these public pension plan trust funds. The existence of these large funds have caused governments currently strapped for revenue to question the necessity of making contributions to well funded plans to pay future pensions. *Id.* at p. v.

There is a certain irony to the fact that the retirement systems' success has invited trouble. *Investor's Daily*, June 24, 1991, at 1. In the 1970's pension plans were subjected to scrutiny and criticized for being underfunded. Aided by the bull markets of the 1980's, public retirement systems addressed and corrected the underfunding problem and increased the assets of public pension funds from \$250 billion in the mid-1980's to over \$720 billion currently. However, those same public retirement systems now find themselves facing state and local governments who have not fared or managed as well economically and who therefore have substantial budget deficits, which severely constrain their spending abilities. House of

Representatives Committee on Education and Labor, Public Pension Plans, supra, at p. vi.

The result? A raid on the pension funds by numerous state and local governments -- the primary form of the raid being a reduction in employer contributions to the system. Through Assembly Bill 702, California rather uniquely -- and brazenly, as Petitioners note -- has combined reducing its contributions to the public retirement systems with actually appropriating funds from the control of the CalPERS Board, whose members are trustees of the PERS fund for the benefit of the plan participants and beneficiaries. This action, if allowed to pass constitutional muster by the California courts, sets a dangerous precedent of enormous magnitude. San Francisco Chronicle, August 20, 1991, at A14.

There are 201 state governments with public retirement systems and 2,213 local governmental entities with systems. "Employment Retirement Systems of State and Local Governments," supra, at p. XI. If it is constitutional for the major debtor of each of these 2,414 systems to attach or offset retirement funds to any extent, then not one of those retirement funds is secure. If it is constitutional to do what the California Governor and Legislature did in AB 702, then the next question is: when and where will these "appropriations" of retirement funds held in trust for workers and retirees stop; and, if they do not stop, what is the economic effect on the public pension fund system?

## B. Economic Impact

There are two issues with regard to the economic impact of AB 702: (1) its effect on the integrity of the retirement system; and (2) its effect on the individual plan participants and beneficiaries or retirees.

### 1. Economic Impact on the Retiree

One certain economic impact on the individual retiree is that the COLA scheme provided under AB 702 is unlikely to provide the level of benefits with the same dependable regularity or to the same level as that of the IDDA/EPDA program. (Decl. of Ed Friend, p. 3, at Vol. II, p. 159 of Petitioners' Writ). In addition, if the inflation rate averages above 2% annually, the actual purchasing value of a pension benefit will gradually erode. (Decl. of Ed Friend, p. 4). For example, with a 5% inflation rate, an average pension of \$10,000 annually will erode to 75% of its original purchasing power in 12 years. (Decl. of Ed Friend, p. 5).

Inflation rates for the past few years have been hovering around 5%; however, historically, there have been peaks of inflation, up to 11% in 1974, 10.9% in 1979, and 14.3% in 1980. (Table I, attached as Exhibit 9 to the Decl. of Robert D. Walton, at Vol. II, p. 96 of Petitioners' Writ). If the inflation rate goes above 5%, the number of retirees who fall below the 75% purchasing power floor will greatly increase.

(Decl. of E. Friend, p. 8). In the last 25 years, inflation has been above 5% in 13 of those years. (Decl. of Robert D. Walton, p. 3; Table I attached as Exhibit 9 to Petitioners' Brief, at Vol. II, p. 101 of Petitioners' Writ).

If inflation stays at 5% and if salaries do not increase and if investment returns remain at the high levels of the bull markets, then the effect of AB 702 may not be disastrous. However, if all those factors do not remain at the status quo level, then the potential is there for a devastating impact on the nearly 1 million CalPERS members and beneficiaries. (Decl. of Chris Nishioka, p.2, at Vol. II, p. 3 of Petitioners' Writ; Decl. of Gary M. Jones, p. 1, at Vol. II, p. 1 of Petitioners' Writ). Moreover, if assets are taken to address governmental budget deficits, retirees are left without any kind of hedge against inflation. Pensions & Investment Age, July 8, 1991, at 39.

Even if those factors remain the same, at the very least the integrity of the system is impaired, as is the members' sense of security with regard to their retirement futures. By analogy, the CalPERS participants and beneficiaries are like homeowners who invested well and have accumulated enough money to pay off their house mortgage in order to provide them with security in their golden years -- just as CalPERS has managed the fund well enough to build up enough reserve monies to fund cost of living adjustment accounts to provide their members with security. Then the State of California comes in and says,

"I know you've made yourselves secure for the future, but I need money right now; so I need to mortgage your house in order to get that money; but rest assured that I'll make the interest payments for you so you are not really out any money."

The State has taken that homeowner's assets and security -- although it is true that the homeowner's monthly cash flow is not immediately affected. Something perhaps far more important is gone. The State has tendered an I.O.U. -- which is an I.O.U. from an entity that for reasons of political pressure is not willing to make tough choices. Thus, the homeowner -- and by analogy, the pension assets -- are left in an extremely vulnerable position in the midst of uncertain economic times. That vulnerability is compounded when the State tenders its I.O.U. from the posture of a deficiency budget. This "appropriation" can have a destabilizing effect on public retirement funds for years and creates a situation that the taxpayers may ultimately have to bail out the government -- as they have had to do with the crisis in the savings and loan industry.

Even if this raid on pension funds does not have an immediate effect on current retirees, the state is borrowing from the future to pay for today's spending. Chicago Sun Times, Sept. 1, 1991. The short-term effect? Delaying or reducing employer contributions in order to balance the budget today simply postpones the day of reckoning. Those shortfalls will eventually have to be made up by taxpayers when

the number retirees increases, as is certain to do. People over 65 make up the fastest growing segment of the American population, multiplying at more than twice the rate of the rest of the population. Clark, "The Aging of America: The Shape of Things to Come," in Employee Benefit Issues 553, 555 (1989). If the shortfall is not made up, it is inescapable that tomorrow's retirees will face large reductions in their benefits. Chicago Sun Times, Sept. 1, 1991; New York Times, July 21, 1991, sect. 1, p.1, col. 1.

## 2. Economic Impact on the Integrity of the System

The State's raid on the CalPERS fund may not have an immediate effect on current benefits, but the other 14 million state and local government employees are watching warily, worried about the effect on the long-term security of their pensions. New York Times, sect. 1, p. 1., col. 1.

Many public employees enter government service with the expectation of a pension which will be adequate to meet their retirement needs. Thus, many civil servants work for lower wages than they otherwise would as a trade-off for some retirement security. Lantry & Williams, supra, at p. 3.

Pensions are in effect pay withheld in order to induce long-term faithful services. Kern v. Long Beach, 179 P.2d 788 (1947). One of the main objectives in providing pensions is to induce competent persons to enter and remain in public employment. Id. Thus, retirement plans create greater

employee loyalty -- which results in a more stable and contented work force. Lantry & Williams, SUPRA, at p. 16.

The court in Dadisman noted that its legislature was not the first to "yield to the temptation of diverting pension funds in hard economic times." Dadisman v. Moore, 384 S.E.2d 816, 823 (W. Va. 1988). However, the court found little merit to the argument that the State's gross underfunding of its pension fund was merely technical since current retirement benefits were being paid. The court said that even when a reduction in the fund does not result in out-of-pocket losses for plan participants, they still have a vested interest in the integrity of the fund to pay future benefits. Id.; see also Valdes v. Cory, 139 Cal. App. 3d 773 (1983).

The income of a public retirement fund generally comes from three sources: employer contributions, employee contributions, and investment earnings. Lantry & Williams, SUPRA at 1. At present, 71% of the benefits currently being paid by CalPERS are financed by investment returns on the fund; 18%, by employer contributions; and 11%, by employee contributions. (Decl. of Ed Friend, p. 5) If the State is not going to contribute for the approximately 3 years that it will take to deplete the \$1.6 billion IDDA/EPDA account, that 18% must come from somewhere and that somewhere is the corpus of the trust, the retirement fund. Roughly \$500 million a year will be taken out in employer contributions, which means that the fund will be reduced by about 1% a year.

The loss though reduced or no employer contributions is compounded each year because no interest can be earned on money not in the fund. Pensions & Investment Age, August 19, 1991, at 2. Especially if there is a downturn in the securities market at the same time, this removal of funds from the trust corpus could jeopardize retirement benefits. Los Angeles Times, June 16, 1991, at 1, col. 2, part D. As Petitioners noted and Amici agree, a retirement system has to accumulate current contributions in order to generate sufficient reserves to make future benefit payments and preserve the structural integrity of the system. (Decl. of Stephen Young, at Vol. II, p. 183).

In establishing a retirement plan, a public employer is promising to pay benefits which will come due in the future. P. Zorn, Survey of State Retirement Systems Covering General Employees and Teachers 21 (1990); however, a raid on those funds is a breach of that promise. AB 702 amounts to a short-term raid on assets, with no attention to long-term liabilities. Los Angeles Times, June 19, 1991, at 1, col. 2, part D. Such short-sighted measures without regard to long-term obligations threaten the integrity of all retirement systems and the retirement security of the public servants of America, now victims of governmental economic crises.

D. Economic Impact on Secondary Capital Markets

If the raids on retirement funds continue, such will not only result in impairment of the relative health of these systems, but also this shrinking of fund assets will have a separate negative impact on the U.S. economy. In 1990, 50% of the venture capital generated for business development in the U.S. came from pension funds -- with 24% of that from public pension funds and 27% from private pension funds. Schutt, Fund-Raising Falls 45% in First Half, Venture Capital J. 20, 21 (Aug. 1991). Over the last few years when private venture capitalists grew risk averse, public funds have increasingly stepped in to make up the shortfall. Bonnanzio, Long Dismissed by Venture Capitalists, State Programs Are Gaining, Venture Capital J. 24, 24 (Aug. 1991). According to one business commentator, "pension funds remain the main engine" in the venture capital industry. Schutt, supra at 21. Consistent with a two-year decline, in the first half of 1991 there was a 45% reduction in the dollar value of venture capital. If state and local governments continue to raid these funds, there will be a very negative effect on the economy nationwide in terms of business development and new jobs for unemployed workers.

E. Precedential Effect of AB 702

At least 18 states have delayed or reduced payments to their pension plans in the last two economically troubled years

or are considering doing so. New York Times, July 21, 1991, at sect. 1, p. 1, col. 1. State and local governments have commonly tried to reduce annual contributions to pension funds by stretching out payments or changing accounting methods and assumptions to calculate funds' long-term financial obligations. New York Times, July 21, 1991, at sect. 1, p. 1, col. 1.

However, the California plan is unprecedented in scope and, if successful, could lead other states to raid pension funds -- thus, creating a domino effect. Los Angeles Times, June 19, 1991, at 1, col. 2, part D. The following highlights some of the activity in other jurisdictions:

**Connecticut (teachers only)**

State government has stretched out required pension contributions in future years.

**Illinois (teachers only)**

The Assembly has authorized the diversion of \$21 million from the public employee pension fund to general state spending accounts in an effort to help balance a \$50 million deficit in the Illinois budget for 1992. This action is exacerbated by the fact that the Illinois system is seriously underfunded. A class action lawsuit was just filed to delay that transfer of funds. Chicago Sun Times, Sept. 1, 1991; Pensions & Investments, July 8, 1991, at 39.

**Maine**

Reports are that Maine officials are looking to the pension fund to solve its budget deficiencies by deferring \$133 million that had been earmarked for pension contributions over the next few years. Telephones at the retirement system and governor's office were not being answered because all non-essential services had been shut down until some resolution of the deficit was reached. Pensions & Investments, July 8, 1991, at 39.

### Vermont

Legislature appropriated teachers' retirement fund \$18 million less than it requested over the last two years. New York Times, July 21, 1991, at sect. 1, p. 1, col. 1.

### Philadelphia

Trustees of the municipal pension fund agreed to allow the city to defer its \$130 million pension contribution due in June. Although the trustees had considered suing for impairment of contract, they settled in order to save \$20 million in interest. Pensions & Investments, July 8, 1991, at 39.

### Texas

The State Comptroller recently proposed a plan for Legislature's consideration which would slash contributions to the teacher's retirement fund from 7.6% to 6%. New York Times, July 21, 1991, at sect. 1, p. 1, col. 1. The plan also proposed a committee composed of the governor, lieutenant governor, and comptroller to oversee funding issues -- which is now the responsibility of individual state pension fund boards. Another feature of the plan was to allow the state to set retirement systems' budgets. Pensions & Investments, July 8, 1991, at 1, 39. Although the specially-called legislative session ended without action on the plan, many political observers see it as a "testing" of the waters.

In none of the other states has the constitutionality of this type "appropriation" of a reserve fund been tested. That is why this writ of mandamus assumes such importance to public employee retirement funds across the nation. Some jurisdictions, like Texas, have taken a "wait and see" approach. A California victory would embolden not just 50 governors, but also a multitude of local government entities, to use raids on pension funds as an alternative for raising taxes because it is not politically expedient for either state or governmental entities to make such hard decisions. If a direct taking of a reserve pension fund account and the

unilateral modification of a contract to the detriment of pension beneficiaries withstands constitutional muster, there will be nothing standing in the way of any governmental entity's free access to the pensions of 15 million current and former public servants.

II. The Legislated Plan Makes a Mockery of Internal Revenue Code Provisions Designed to Benefit Employees

A. Introduction

If not declared unconstitutional or invalidated on some other basis, the enacted plan would live, ironically, only to kill employee benefits. Unquestionably, a principal purpose of pension plans is to defer a portion of employees' compensation, in the form of employer contributions to the plan, until it and its earnings are distributed and taxed in later lower-income years. The legislation in question strips the plan of this integral benefit by virtually flouting the Internal Revenue Code requirements that are necessary to preserve it. As explained below, the statutory modification would bring about this result, under the Internal Revenue Code, by causing the plan to be disqualified from the exempt status that is essential to the employees' deferred tax benefit.

If the legislation stands, the public employees covered by this plan, whose compensation has consisted in part of temporary tax-free employer contributions and fund earnings, will be subject to present income taxation as if they had directly received the contributions as salary and as if they

had been in possession of their share of the plan's earnings. Moreover, the pernicious effect of this sudden, purpose-defeating tax liability would be drastically compounded by that aspect of the legislation that allows the plan's sponsor to invade the already-taxable fund with one hand and restore it with another for the purpose of evading its future contribution obligations.

Unless stricken, this plan would subject employees to taxation on compensation that not only did they not receive when the tax liability would have been incurred, but also that they could not receive until it was returned to the plan in the illusory form of the sponsor's future contributions. Perhaps the employees would be lucky enough not to be taxed on the same sum a second time -- when their employer re-contributes, the converted contribution for which the disqualification had already resulted in tax liability once.

B. The Legislation Creates a Plan that Could Not Qualify Under Internal Revenue Code § 401(a) and that Wrongfully Appropriates Vested Property Rights.

Section 401(a) provides that, under certain conditions, "a trust created or organized in the United States and forming part of a stock bonus, pension or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section." Section 402(a), titled "Taxability of beneficiary of employees' trust" provides that distributions from an exempt

trust are taxable to the employee in the year in which so distributed. Section 402(b), titled "Taxability of nonexempt trust," provides that contributions to a nonexempt trust "shall be included in the gross income of the employee."

The statutorily modified plan would eliminate deferred taxation for employees because, as enacted, it could not satisfy the condition for qualification under § 401(a)(2). For a pension trust to qualify under § 401(a)(2), it must be impossible for the corpus or income of the trust to be used for purposes other than the exclusive benefit of employees or their beneficiaries. As stated in the Federal Tax Regulations:

As used in section 401(a)(2), the phrase "if under the trust instrument it is impossible" means that the trust instrument must definitely and affirmatively make it impossible for the nonexempt diversion or use to occur, whether by operation or natural termination of the trust, by power of revocation or amendment, by the happening of a contingency, by collateral arrangement, or by any other means. Although it is not essential that the employer relinquish all power to modify or terminate the rights of certain employees covered by the trust, it must be impossible for the trust funds to be used or diverted for purposes other than for the exclusive benefit of his employees or their beneficiaries.

26 CFR 1.401-2(a)(2).

The "exclusive benefit" requirement even calls into question a pension plan trustee's consideration of whether to invest the plan's funds in securities issued by the sponsor, especially when the purchase of such securities would enhance the sponsor's ability to meet future contribution commitments. According to the Internal Revenue Service, even that kind of quid-pro-quo investment involvement with the plan's sponsor

would be violative of the "exclusive benefit" provision and thus would disqualify the plan, unless the following factors are satisfied:

(1) the cost must not exceed fair market value at the time of purchase; (2) a fair return commensurate with the prevailing rate must be provided; (3) sufficient liquidity must be maintained to permit distributions in accordance with the terms of the plan; and (4) the safeguards and diversity that a prudent investor would adhere to must be present.

Rev. Rul. 69-694, 1969-2 C.B. 88 (1969).

A sponsor's sale of securities to its plan presents a debatable "exclusive benefit" question, but the exempt status is protectable with safeguards. This plan is another matter altogether. A plan that permits its sponsor to convert a part of the corpus with no semblance of consideration would obviously not satisfy the "exclusive benefit" test and would result in a disqualified plan under § 401(a).

There is another reason why the statutory scheme deprives the plan of § 401(a) exempt status. A plan will be considered an exempt pension plan "if the employer contributions under the plan can be determined actuarially on the basis of definitely determinable benefits." See 26 CFR § 1.401-1(b)(1)(i). In transferring the actuarial determinations (including the assumption rate) from the trustee to a governor's appointee, the legislature created a plan that is violative of this rule of "definitely determinable benefit."

Because these changes destroy a pre-existing § 401(a) qualification, past contributions, which were intended to be

deferred compensation incurring tax liability only upon later distribution per § 402(a)(1), would not be treated that way at all. Moreover, independent of tax consequences, the state's appropriation of reserve funds attributable to prior contributions, for the purpose of irretrievable budget redirection, amounts to a wrongful modification of vested rights. See Valdes v. Cory, 139 Cal. App. 3d 773, 788-89, 189 Cal. Rptr. 212, 224 (1983).

C. The Legislation Creates a Plan that Requires the Trustees to Engage in Practices Prohibited by Internal Revenue Code § 503.

Even if the legislation did not disqualify the plan under § 401(a), it would destroy the employees' exemption, because, under § 503, it would destroy the trust's exemption. Section 501, titled "exemption from tax on corporations, certain trusts, etc." provides that an organization described in § 401(a) "shall be exempt from taxation unless such exemption is denied under Section 502 or 503." Section 503, titled "Requirements for exemption," provides in subsection (a)(1)(B) that "an organization described in § 401(a) which is referred to in § 4975(g)(2) or (3) shall not be exempt from taxation under § 501(a) if it has engaged in a prohibited transaction after March 1, 1954." Section 4975(g)(2) refers to "a governmental plan (within the meaning of § 414(d))." Section 414(d) defines the term "governmental plan" to mean "a plan established and maintained for its employees by the Government

of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."

Thus, the plan in question would not be exempt from taxation if it engaged in a prohibited transaction covered by § 503. Subsection (b) lists the prohibited transactions, identifying five specific transactions and concluding with: "(6) engages in any other transaction which results in a substantial diversion of its income or corpus to ... the creator of the organization (if it is a trust) or a person who has made a substantial contribution to the organization." Consequently, the California Governor's plan renders itself non-exempt by virtue of its fundamental structure, which actively promotes a substantial diversion of the trust's income and corpus to its creator, the entity who has also made the most substantial contributions.

As a result of the diversion authorized by the legislature, the plan could not be exempt from taxation under § 501. Again, as a result of the plan's non-exempt status under § 503, § 402(b) requires that the contributions made to the plan by the employer be included in the gross income of the employee.

#### D. Conclusion

As revised by the California Legislature, the plan does far more than wreak havoc with employees' tax situations. It is a governmental taking of vested property rights -- the very antithesis of what an employee benefit plan is supposed to be.

### III. AB 702 Eviscerates Trustees' Fiduciary Duty to Beneficiaries

One of the more disarming aspects of AB 702 is its schizophrenic treatment of fundamental notions of fiduciary duty. On the one hand, it incorporates the constitutionally-based "exclusive benefit" rule, which states that the "Public Employees' Retirement Fund is a trust fund created and administered ... solely for the benefit of the members and retired members of the system and their survivors and beneficiaries." Cal. Gov't Code Section 20200. The rule "imports into pension fiduciary law one of the most fundamental and distinctive principles of trust law, the duty of loyalty." Fischel & Langbein, ERISA's Fundamental Contradiction: The Exclusive Benefit Rule, 55 U. Chi. L. Rev. 1105 (1988). It places the trustee under a duty to administer the trust solely in the interest of those for whom the trust was created, and for the exclusive purpose of providing benefits to those participants and their beneficiaries.

A corollary to the rule provides that "[s]ince the assets of the employee benefit plan are to be held for the exclusive benefit of participants and beneficiaries, plan assets generally are not to inure to the benefit of the employer." Kwacher v. Massachusetts Service Employees Pension Fund, 879 F.2d 957, 960 (1st Cir. 1989), quoting H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. &

Admin. News 5038, 5083. The corollary is designed to "keep as strict a separation as practicable between employers and the funds set aside to benefit employees." Kwacher, 879 F.2d at 960. In spite of this corollary, AB 702 contains a provision specifically designed to "inure to the benefit of the employer." Such legislation places the integrity of the system at grave risk by dividing the loyalty of the trustees.

The problem with AB 702 is that, by requiring the system trustees to minimize the employers' costs of providing benefits, it pits the trustees' obligations to the employer directly against their primary fiduciary obligation to participants and beneficiaries. Under this arrangement, if PERS trustees were to discharge their duty to the employer with perfect efficiency (i.e., "minimize" to the point of \$0.00 the employers' costs), they would necessarily jettison their primary mission to provide benefits to system participants and beneficiaries.

Moreover, if the "employers minimization" provision were held to authorize utilization of pension funds for purposes unrelated to provision of benefits (e.g., deficit reduction or revenue enhancement), the trustees would be subject to significant political pressure to "minimize" the extent to which concern for system beneficiaries guides their decisionmaking. AB 702 seemingly forces the trustees to consider and protect the enormous interests of the State of California, the system's major debtor, before discharging their

duties to the primary beneficiaries of the pension fund. See G. Bogert, The Law of Trusts & Trustees § 543 (2d ed. 1978) ("If permitted to represent antagonistic interests the trustee is placed under temptation and is apt to ... make decisions which favor a third person who is competing with the beneficiary.")

By positioning itself as one of two "masters" to whom the trustees owe fiduciary obligations, the State of California would have this Court abrogate a core principal of the law of trusts. See Restatement (Second) of Trusts § 170, subsection (1) (1959). The duties set forth in Article XVI, section 17 do not reach that far. "Any duty PERS has to minimize employer contributions may not take precedence over its duty to the beneficiaries of the system." City of Sacramento v. Public Employees Retirement System, 280 Cal. Rptr. 847, 861 (Cal. App. 3d Dist. 1991).

As evidenced by the Governor's divestment of actuarial control from the pension trustees, the threat of divided loyalties is not a purely academic concern. If the State of California has its way, decisions which once were motivated by exclusive loyalty to participants and beneficiaries will now be placed in the realm of the political marketplace. This Court should not sanction such an unconstitutional abrogation of the fundamental fiduciary obligations upon which the system was founded. See County of Skamania v. State of Washington, 102 Wash. 2d 127, 685 P.2d 576, 582 (Wash. 1984) (declaring unconstitutional statute whose primary purpose was to benefit third party at expense of trust beneficiaries).

V. Conclusion

The court in Dadisman v. Moore, 384 S.E.2d 816, 830 (W. Va. 1983), put it most succinctly:

The funds in the PERS trust are an equitable estate, property held in common for the benefit of each member and retirant, and dedicated to private ends. The trust funds are not taxpayers' money. The trust funds have been earned by public employees for the benefit of the trust, thus, the funds are not public property.

In derogation of constitutional principles and trust principles and the Internal Revenue Code, the State of California has treated the \$1.6 billion in the cost of living adjustment funds as their own property and not as funds held in trust for the benefit of those almost 1 million public servants in the CalPERS system. Such governmental action should be condemned and invalidated by this Court as violative of specific constitutional provisions, as well as general constitutional notions of fair play.

For the foregoing reasons, the National Conference on Public Employee Retirement Systems and the San Jose Police and Fire Department Retirement Plan as Amici Curiae urge this Court to exercise its original jurisdiction and order the relief prayed for.

Dated: September 9, 1991

Respectfully submitted,

JOAN R. GALLO, City Attorney

By: Susan Devencenzi  
SUSAN DEVENCENZI  
Senior Deputy City Attorney

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## **EXHIBIT 2**

STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD



INTERNATIONAL ASSOCIATION OF  
FIREFIGHTERS, LOCAL 230,

Charging Party,

v.

CITY OF SAN JOSE,

Respondent.

Case No. SF-CE-969-M

COMPLAINT

It having been charged by Charging Party that Respondent engaged in unfair practices in violation of California Government Code section 3500 et seq., the General Counsel of the Public Employment Relations Board (PERB), pursuant to California Government Code sections 3509(b) and 3541.3(i) and California Code of Regulations, title 8, section 32640, issues this COMPLAINT on behalf of PERB and ALLEGES:

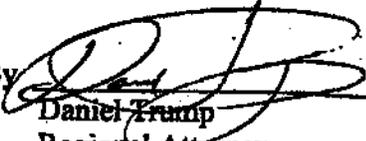
1. Charging Party is an exclusive representative within the meaning of PERB Regulation 32016(b) of an appropriate unit of employees.
2. Respondent is a public agency within the meaning of Government Code section 3501(c) and PERB Regulation 32016(a).
3. On or about April 13, 2011, May 13, 2011, June 14, 2011, and February 24, 2012, Respondent knowingly provided inaccurate information to Charging Party regarding its fiscal obligations regarding future retirement benefits.
4. On or about February 21, 2012 Respondent informed Charging Party that the San Jose City Council would consider Resolution Number 76158, a ballot measure concerning future retirement benefits, at its meeting on March 6, 2012.

5. On or about February 28, 2012, Charging Party requested to meet and confer with Respondent over Resolution Number 76158.
6. On or about March 5, 2012, Respondent refused to meet and confer with Charging Party over Resolution Number 76158.
7. On or about March 6, 2012, the San Jose City Council adopted Resolution Number 76158.
8. Respondent engaged in the conduct described in paragraph 7 without having negotiated with Charging Party to agreement or through completion of negotiations concerning the decision to implement the change in policy and/or the effects of the change in policy.
9. By the acts and conduct described in paragraphs 3 through 8, Respondent failed and refused to meet and confer in good faith in violation of Government Code sections 3505 and 3506.5(c), and committed an unfair practice under Government Code section 3509(b) and PERB Regulation 32603(c).
10. This conduct also interfered with the rights of bargaining unit employees to be represented by Charging Party in violation of Government Code sections 3506 and 3506.5(a), and is an unfair practice under Government Code section 3509(b) and PERB Regulation 32603(a).
11. This conduct also denied Charging Party its right to represent bargaining unit employees in violation of Government Code sections 3503 and 3506.5(b), and is an unfair practice under Government Code section 3509(b) and PERB Regulation 32603(b).

Any amendment to the complaint shall be processed pursuant to California Code of Regulations, title 8, sections 32647 and 32648.

DATED: March 8, 2013

M. SUZANNE MURPHY  
General Counsel

By   
Daniel Trump  
Regional Attorney

## PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Alameda, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, 1330 Broadway, Suite 1532, Oakland, CA 94612-2514.

On March 8, 2013, I served the Letter regarding Case No. SF-CE-969-M on the parties listed below by

placing a true copy thereof enclosed in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid.

personal delivery,

facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).

Christopher E. Platten, Attorney  
Wylie, McBride, Platten & Renner  
2125 Canoas Garden Avenue, Suite 120  
San Jose, CA 95125

Gina Donnelly, Deputy Director of Employee Relations  
City of San Jose  
200 East Santa Clara Street  
San Jose, CA 95113-1905

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on March 8, 2013, at Oakland, California.

\_\_\_\_\_  
C. E. Johnson  
(Type or print name)

\_\_\_\_\_  
  
(Signature)

**EXHIBIT 3**

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UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

**REOC**  
**Plaintiff,**  
  
**v.**  
**COUNTY OF ORANGE,**  
  
**Defendant.**

CASE NO. SACV 07-1301 AG (MLGx)  
  
**ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING AS  
MOOT PLAINTIFF'S MOTION FOR  
SUMMARY ADJUDICATION**

In this case, Plaintiff Retired Employees of Orange County ("REOC") asks Defendant County of Orange (the "County") to pay for a promise that it never made: to continue using a favorable "pooling" methodology to calculate the health care premiums of its retired employees. REOC claims that the County's 23-year practice of annually authorizing this generous methodology morphed into an implied contract requiring the County to guarantee this benefit for life. The County insists that it never intended to grant a vested right to pooling, pointing out that no legislative enactment supports such an implied benefit.

The procedural history of this case is as serpentine as the issues it raises. This is the second time that the Court has considered the parties' cross-motions for summary judgment. *See Retired Emps. Ass'n. of Orange Cnty. v. Cnty. of Orange ("REOC I")*, 632 F. Supp. 2d 983 (C.D. Cal. 2009). After the Court granted summary judgment for the County the first time, an appeal wound its way up to the Ninth Circuit. *See Retired Emps. Ass'n. of Orange Cnty. v. Cnty. of*

1 *Orange* (“*REOC II*”), 610 F.3d 1099 (9th Cir. 2010). The Ninth Circuit then certified a question  
2 to the California Supreme Court. *See Retired Emps. Ass’n. of Orange Cnty., Inc. v. Cnty. of*  
3 *Orange* (“*REOC III*”), 52 Cal. 4th 1171 (2011). The question was answered and the matter  
4 returned to the Ninth Circuit, which then sent the case back to this Court.

5 In the meantime, this Court was also presiding over a companion case, *Harris et al. v.*  
6 *County of Orange*, No. SACV 09-0098 (C.D. Cal. filed Jan. 22, 2009), which involved the same  
7 counsel and many of the same issues. This Court issued a summary judgment in *Harris*, which  
8 was then reviewed by the Ninth Circuit and remanded to this Court. The *Harris* plaintiffs then  
9 brought a “Motion for Clarification” of the portion of the Ninth Circuit Opinion discussing  
10 matters related to the *REOC* cases. The Ninth Circuit recently denied the Motion for  
11 Clarification, so this Court now issues its decision in this *REOC* case.

12 Clearing away the winding substantive and procedural underbrush, it appears that both  
13 the California Supreme Court and the Ninth Circuit confirmed the bedrock foundation of this  
14 Court’s original *REOC I* opinion. Under California Government Code Section 25300, any right  
15 to employee compensation must in some way be approved by the Board of Supervisors with a  
16 resolution or ordinance. Applying Section 25300, the California Supreme Court held that *REOC*  
17 bears the burden of proving that the relevant statutes or ordinances reflect “clear” legislative  
18 intent to enter into such a contract. *REOC III*, 52 Cal. 4th at 1187. Because *REOC* fails to make  
19 this showing, the Court must once again grant summary judgment in favor of the County.

20 The Court GRANTS the County’s Motion for Summary Judgment on behalf of the  
21 County.

22  
23 **1. BACKGROUND**

24  
25 Plaintiff *REOC* is a California nonprofit organization representing over 4,600 Orange  
26 County retired employees and their spouses. On November 5, 2007, *REOC* filed this lawsuit  
27 challenging the County’s decision to stop utilizing a favorable “pooling” methodology to  
28 calculate the health care premiums for retired employees. *REOC* claims that all employees

1 | retired as of January 1, 2008—the date the County stopped implementing the policy—are entitled to  
2 | receive the benefit of the pooling methodology for the rest of their lives. Although this promise  
3 | does not appear in the County ordinances or resolutions, REOC argues that the County’s past  
4 | practice of using this methodology, combined with other facts, gave rise to an implied contractual  
5 | obligation to provide the pooling benefit for life. The Court begins its factual summary by  
6 | reviewing the origins of this dispute.

7 |  
8 | **1.1 Resolutions 66-124, 68-329, and the 1991 OCEA Opinion**

9 |  
10 | The County’s Board of Supervisors (“Board”) has full authority to establish the terms of  
11 | compensation for its workforce. Cal. Const. art. XI, §§ 1(b), 4. All compensation must be  
12 | approved by resolution or ordinance. Cal. Gov’t. Code § 25300.

13 | In 1966, the County first decided to provide group medical insurance to retired employees,  
14 | approving this in Resolution (“Resolution”) 66-124. *See Orange Cnty. Emps. Ass’n. v. Cnty. of*  
15 | *Orange (“OCEA”),* 234 Cal. App. 3d 833, 839 (1991). In April 1968, Resolution 68-329  
16 | authorized the County to make premium payments on behalf of the retired employees. *Id.* In  
17 | July 1978, the County ceased these premium payments under the theory that “contribution to  
18 | retiree medical insurance premiums is not a vested right but rather is subject to the annual  
19 | discretion of the Retirement Board.” *Id.* In 1991, a California appellate court upheld the  
20 | County’s reasoning, finding that its “review of the entire statutory scheme discloses that the  
21 | Legislature did not intend” to provide retired employees with the same benefits as active  
22 | employees. *Id.* at 845. While they were not entitled to benefits on par with active employees,  
23 | retired employees maintained their ability to enroll in group health care coverage, paying the  
24 | premiums set by the Board. (Declaration of Patricia Gilbert, Dkt. No. 107 “Gilbert 107 Decl.,”  
25 | ¶ 7.)

1       **1.2 Rate Resolutions and Resolution 84-1460**

2  
3       Each year, the Orange County Board of Supervisors ("Board") votes to formally approve  
4 the health care premiums for both retired and active employees for the following calendar year.  
5 (Gilbert 107 Decl., ¶ 25, 33, Ex. B.) In this process, the County staff presents the Board with a  
6 formal Resolution containing a schedule of the proposed premium rates. The Board then votes on  
7 the Resolution. (Gilbert 107 Decl., ¶ 25, 33, Ex. B.)

8       From 1966 through 1984, the County consistently approved one premium rate for active  
9 employees, and another for retired employees. (Declaration of Russell Patton, "Patton Decl.,"  
10 ¶ 6.) In 1984, the Board decided to group, or "pool," retired and active employees together to  
11 calculate the 1985 annual premium rate. (Gilbert 107 Decl., Ex. B.) Under this methodology,  
12 there was only one combined premium rate for both groups. This decision was authorized in  
13 Resolution 84-1460. (Gilbert 107 Decl., Ex. B.)

14       The impetus for the "pooling" methodology was a \$900,000 shortfall in the budget for  
15 retiree healthcare due to a large accounting mistake. (Patton Decl., ¶ 7); (Declaration of Gaylan  
16 Harris, Dkt. No. 128, "Harris 128 Decl.," ¶ 8.) The County had been erroneously reporting  
17 retiree medical insurance claims as active employee claims, which meant that premiums paid by  
18 retirees were far too low to cover the actual expenses. (Patton Decl., ¶ 7); (Harris 128 Decl., ¶ 8.)

19       The Agenda Item Transmittal ("AIT") portion of Resolution 84-1460, which contains the  
20 staff descriptions of the pending action items, briefly outlines the issue as follows:

21  
22       Unlike County employees, retirees pay all their costs for health insurance  
23 premiums. Historically [retired employees] have been rated separately and  
24 currently pay lower rates (approximately 55 percent) than employees. However,  
25 analysis of data of revenue from retirees is projected to be insufficient to cover  
26 expenditures for 1984. As a result, the reserves for the retiree indemnity health  
27 plan will be reduced by (approximately \$900,000)."  
28

1 (Gilbert 107 Decl., Ex. B, 1985, p. OCMSJ03924.) The AIT then describes two ways to handle  
2 this budget shortfall: increase retiree premiums by 112%, or “equalize[]” retiree and employee  
3 rates, resulting in a 72% increase to retiree rates. (Gilbert 107 Decl., Ex. B, 1985, p.  
4 OCMSJ03924.) Without further justification or discussion, the AIT states that table 5B  
5 incorporates the second recommendation.

6 Table 5B, titled “Retired Employees Monthly Premium Rates Effective January 1, 1985,”  
7 has no further embellishment. It simply lists the premiums for calendar year 1985 for retired  
8 employees. (Gilbert 107 Decl., Ex. B, 1985, p. OCMSJ04005.) It does not list rates for any other  
9 year. Nothing in Resolution 84-1460 indicates that pooling will continue beyond calendar year  
10 1985.

11 Finally, the triggering language of Resolution 84-1460 states, without further commentary:  
12 “Approves the rate tables as contained in Exhibit 5, 5A, 5B,” and “Authorize . . . the adoption of  
13 1985 health rates.” (Gilbert 107 Decl., Ex. B, 1985, p. OCMSJ03921-22.)

14 Although the short-term impact of Resolution 84-1460 was to *raise* retirees’ premiums by  
15 72%, it provided a generous benefit to the retirees in the following years. By combining the  
16 relatively high premiums of retired employees with the lower premiums of the relatively more  
17 healthy active employees, the pooling methodology reduced the premium paid by retired  
18 employees by shifting the cost to active employees. The County paid the bulk of this shifted cost  
19 under its pre-existing policy of paying a large portion of active employees’ premiums. (Harris  
20 128 Decl., ¶ 6.); (Declaration of Shelley Carlucci, Dkt. No. 106 “Carlucci 106 Decl.,” ¶ 33, Ex.  
21 B.) Thus, the net effect of pooling was that the County subsidized the premiums of retired  
22 employees (the “Subsidy”).

### 23 24 **1.3 The 1993 Plan**

25  
26 In 1993, the Board of Supervisors passed Resolution 93-369, adopting a new  
27 comprehensive retiree medical program called the “County of Orange Retiree Medical Plan”  
28 (“1993 Plan”). (Gilbert 107 Decl., ¶¶ 11-19, Ex. A.) Under the 1993 Plan, retired employees

1 received a monthly fixed-dollar stipend to defray their premium costs. (*Id.*) The 1993 Plan does  
2 not address the Subsidy or the premium-setting methodology, nor does it guarantee specific  
3 premium rates. (*Id.*) The 1993 Plan specifically states that it creates no vested rights. (*Id.*) It  
4 also specifically reserves the County's right to amend or terminate the 1993 Plan at any time.  
5 (*Id.*)

#### 6 7 **1.4 Other Related Legislative Enactments**

8  
9 After it passed the 1993 Plan, the Board continued to annually approve premium rates  
10 through the rate Resolutions. (Gilbert 107 Decl., Ex. B.) To support its Motion for Summary  
11 Judgment, the County submitted a complete record of rate Resolutions from 1981 through 2009,  
12 as well as salary and personnel Resolutions. (Gilbert 107 Decl., Ex. B); (Declaration of Shelley  
13 Carlucci, Dkt. No. 106 "Carlucci 106 Decl.," ¶¶ 3, 6-10, Exs. A-Z.) The County also submitted  
14 the corresponding record of approved memorandums of understanding ("MOUs.") (Carlucci 106  
15 Decl., ¶¶ 3, 6-10, Exs. A-Z.) MOUs are tentative bilateral agreements between the Board  
16 negotiators and the labor unions, which become binding after they are officially approved by the  
17 Board. Cal. Gov't. Code § 3501.1. When an MOU has expired, the parties may negotiate  
18 changes to its provisions. *Id.*

19 These legislative materials reflect a yearly process of setting rates. In other words, each  
20 year the Board approved the premium rates for the upcoming year, but no further. There is no  
21 reference to any continuing obligation to maintain the policy beyond the upcoming calendar year.  
22 In fact, certain Resolutions explicitly refer to the pooling as a "policy" or "practice," and consider  
23 the effect of discontinuing this "policy." (Gilbert 107 Decl., Ex. B, p. OCMSJ04390.) For  
24 example, the 1997 Resolution states:

25  
26 The County's policy has been to set the required retiree rates at an amount equal to  
27 100% of the average rate for active employees and retirees. . . . This practice has  
28 resulted in the active employee rates subsidizing the retiree rates. For 1998 the

1 active rates will subsidize the retiree rates by approximately \$2,550,000. If this  
2 subsidy was eliminated and not considering the fund balance, the retiree rates  
3 would increase by 58% with active rates decreasing by 2.4% (averaging to the  
4 required 7.8% increase, after considering the Fund Balance interest).

5  
6 (Gilbert 107 Decl., Ex. B, p. OCMSJ04390.)  
7

### 8 **1.5 County's Decision to Terminate Pooling**

9  
10 In 2004, the County began a review of its retiree health care program. (Gilbert 107 Decl.,  
11 ¶¶ 35, 36, 40.) The County formed a Retiree Medical Panel, with representatives from the labor  
12 unions. (Gilbert 107 Decl., ¶ 36.) After extended negotiations, the County reached a broad  
13 reform agreement, including an agreement to stop the pooled structure, which became effective  
14 January 1, 2008. (Gilbert 107 Decl., ¶¶ 41-58.) The County did not formally negotiate this  
15 agreement with the retired employees, although it did work with REOC to come up with  
16 alternative plans. (*Id.*)  
17

## 18 **2. PRELIMINARY MATTERS**

### 19 20 **2.1 Request for Judicial Notice**

21  
22 The parties filed various requests for judicial notice, both in their original briefing and  
23 after remand. (Dkt. Nos. 111, 144, 147, 220.) Most of those requests are unopposed, and  
24 concern legislative materials such as the relevant Resolutions. The County opposes some of  
25 Plaintiff's requests on the grounds that they are not official public records, and that they are  
26 irrelevant. (*See* Dkt. Nos. 168, 230.)

27 The Court may take judicial notice of documents under Federal Rule of Evidence 201(b).  
28 The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is

1 generally known within the trial court's territorial jurisdiction; or (2) can be accurately and  
2 readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R.  
3 Evid. 201(b). Courts may take judicial notice of "*undisputed* matters of public record," but  
4 generally may not take judicial notice of "*disputed* facts stated in public records." *Lee v. City of*  
5 *Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) (emphasis in original); *see also MGHC Indem.*  
6 *Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (holding that courts can take judicial notice  
7 of pleadings and court orders that are matters of public record.)

8 Putting aside the issue of whether judicial notice is even necessary in relying on items like  
9 a board resolution, the Court GRANTS the parties' requests for judicial notice. In doing so, the  
10 Court does not decide that these documents constitute part of the official public record for  
11 purposes of its contract analysis. Defendant's relevancy arguments are addressed in the analysis  
12 that follows.

13

14 **2.2 Evidentiary Objections and Requests to Strike Evidence**

15

16 The parties submitted voluminous evidence supporting their papers. While much of the  
17 evidence was undisputed, there were also a substantial number of objections. (*See, e.g.,* Dkt.  
18 Nos. 136, 149, 162, 168.) On motions with voluminous objections "it is often unnecessary and  
19 impractical for a court to methodically scrutinize each objection and give a full analysis of each  
20 argument raised." *Capitol Records, LLC v. BlueBeat, Inc.*, 765 F. Supp. 2d 1198, 1200 n.1 (C.D.  
21 Cal. 2010) (a summary judgment case quoting *Doe v. Starbucks, Inc.*, 2009 WL 5183773, at \*1  
22 (C.D. Cal. Dec. 18, 2009)). Further, many of these objections are made on relevancy grounds  
23 that go to the heart of the Court's analysis, and are thus addressed in the analysis. Because the  
24 Court can not rely on irrelevant facts, objections based on relevancy are redundant. *See generally*  
25 *Burch v. Regents of the Univ. of Cal.*, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006) (noting that  
26 parties may simply *argue* that certain facts are irrelevant, instead of objecting to them on  
27 relevance grounds).

28 The remainder of the objections are largely moot, because the Court did not rely on most

1 of the evidence under objection. *See, e.g., Smith v. Cnty. of Humboldt*, 240 F. Supp. 2d 1109,  
2 1115-16 (N.D. Cal. 2003) (refusing to rule on the evidentiary objections in defendant's reply  
3 "because even if the evidence submitted by plaintiff is considered by this Court, plaintiff fails to  
4 state a colorable claim"). To the extent that the Court relied upon any evidence, the related  
5 evidentiary objections are overruled. *See Burch*, 433 F. Supp. 2d at 1118 (condemning the  
6 prevalent and time-consuming practice of "fil[ing] objections on all conceivable grounds" and  
7 concluding that "the court will [only] proceed with any necessary rulings on defendants  
8 evidentiary objections").

9  
10 **3. LEGAL STANDARD**

11  
12 Summary judgment is appropriate only where the record, read in the light most favorable  
13 to the non-moving party, indicates that "there is no genuine issue as to any material fact and . . .  
14 the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex*  
15 *Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Material facts are those necessary to the proof or  
16 defense of a claim, as determined by reference to substantive law. *Anderson v. Liberty Lobby,*  
17 *Inc.*, 477 U.S. 242, 248 (1986). A factual issue is genuine "if the evidence is such that a  
18 reasonable jury could return a verdict for the nonmoving party." *Id.* In deciding a motion for  
19 summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable  
20 inferences are to be drawn in his favor." *Id.* at 269.

21 The burden initially is on the moving party to demonstrate an absence of a genuine issue  
22 of material fact. *Celotex*, 477 U.S. at 323. If, and only if, the moving party meets its burden,  
23 then the non-moving party must produce enough evidence to rebut the moving party's claim and  
24 create a genuine issue of material fact. *Id.* at 322-23. If the non-moving party meets this burden,  
25 then the motion will be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Co.*, 210 F.3d 1099, 1103  
26 (9th Cir. 2000).

1 **4. ANALYSIS**

2  
3 As noted, in June 2009 this Court issued an Order granting the County's motion for  
4 summary judgment. *REOC I*, 632 F. Supp. 2d at 987. This Court's original order found that  
5 proper deference to the taxpayers of Orange County, and provisions including California  
6 Government Code Section 25300 required it to rule in favor of the County. *Id.* at 985-86. *REOC*  
7 *I* ultimately resulted in *REOC III*, the California Supreme Court's opinion on the certified  
8 question. In *REOC III*, the California Supreme Court provided guidance but did not apply the  
9 law to the facts of this case.

10 The Court now reviews *REOC III*, as well as some of the cited caselaw. The Court also  
11 reviews the recent Ninth Circuit decision in *Harris*, the companion case. After this review, the  
12 Court proceeds to the merits of this case once again.

13  
14 **4.1 Guiding Caselaw**

15  
16 **4.1.1 REOC III**

17  
18 The question the Ninth Circuit certified to the California Supreme Court was "[w]hether,  
19 as a matter of California law, a California county and its employees can form an implied contract  
20 that confers vested rights to health benefits on retired county employees." *REOC III*, 52 Cal. 4th  
21 at 1176.

22 As an initial matter, the California Supreme Court agreed with this Court's original order  
23 that California Government Code Section 25300 required courts to "look to Board resolutions,  
24 including those resolutions approving or ratifying MOUs [], to determine the parties' contractual  
25 rights and obligations." *Id.* at 1185 (citing *Van Riessen v City of Santa Monica*, 63 Cal. App. 3d  
26 193, 196 (1976) (holding that employee benefits would not be upheld "absent some specific  
27 statutory or other lawful authorization")). Unlike other cases where no such statutory mandate  
28 existed, "[S]ection 25300 . . . does constrain a county's discretion" to set compensation, requiring

1 it to act through a formal resolution or ordinance. *Id.* at 1184.

2       The California Supreme Court then found that, although the contractual intent must arise  
3 from the Board resolutions or ordinances, the “case law does not inexorably require that the intent  
4 be express.” *Id.* at 1187. There are “limited circumstances” when “contractual rights may be  
5 implied from legislative enactments.” *Id.* at 1185. These circumstances are necessarily limited  
6 because legislatures primarily use resolutions to establish revocable policies, not to enter into  
7 binding contracts. *Id.* at 1185-86; *see also Cal. Teachers Ass’n. v. Cory*, 155 Cal. App. 3d 494,  
8 504 n. 7 (1984) (“Legislatures, unlike private persons, have the power to create ‘obligations’  
9 which are not contractual in nature.”). “[T]o construe laws as contracts when the obligation is not  
10 clearly and unequivocally expressed would be to limit drastically the essential powers of a  
11 legislative body.” *Id.* at 1185 (quoting *Nat’l R. Passenger Corp. v. Atchinson Topeka & Santa Fe*  
12 *Ry.*, 470 U.S. 451, 466 (1985)). There is thus a presumption that a legislature does *not* intend the  
13 obligations it sets forth in its resolutions to create private contractual rights. *REOC III*, 52 Cal.  
14 4th at 1186.

15       This presumption places a “heavy burden” on a plaintiff to show implied contractual  
16 intent. *Id.* at 1190 (quoting *San Diego Police v. San Diego Ret. Sys.*, 568 F.3d 725, 740 (9th Cir.  
17 2009)). Absent explicit language granting a contractual right, a plaintiff must show that “the  
18 statutory language or circumstances accompanying its passage *clearly* evince a legislative intent  
19 to create private rights of a contractual nature enforceable against the [governmental body].” *Id.*  
20 at 1187 (emphasis added) (citations and quotations omitted); *see also Claypool v. Wilson*, 4 Cal.  
21 App. 4th 646, 670 (1997) (“[T]he implication of suspension of legislative control must be  
22 ‘unmistakable.’”) (quoting *Cal. Teachers Ass’n.*, 155 Cal. App. 3d at 509). This high bar  
23 “ensure[s] that neither the governing body nor the public will be blindsided by unexpected  
24 obligations.” *REOC III*, 52 Cal. 4th at 1189.

25  
26                   4.1.2 Cases Cited in *REOC III*

27  
28       The California Supreme Court noted that “numerous cases ‘have implied contractual

1 obligations from the particular texts and contexts of the statutes at issue.” *REOC III*, 52 Cal. 4th  
2 at 1186 (quoting *Cal. Teachers Ass’n*, 155 Cal. App. 3d at 505). This Court now reviews certain  
3 of those cases, as well as cases finding no implied right.

4 In *Valdes v. Cory*, 139 Cal. App. 3d 773 (1983), the Court of Appeal found that the state  
5 had an implied contractual duty “to make systematic, substantial monthly contributions to the  
6 PERS [Public Employees’ Retirement System] fund[.]” *Id.* at 786. The duty to maintain an  
7 actuarially sound system fell just short of being explicit because the statute did not actually use  
8 the phrase “sound actuarial basis.” *Id.* at 785-86 & 785 n.5. But there were statutory provisions  
9 mandating ongoing “compulsory employer contributions” in specific codified amounts,  
10 accompanied by a statement that these monthly contributions were “continuing obligations of the  
11 State.” *Id.* at 782 (citations and quotations omitted). Relying on that clear statutory language, the  
12 Court of Appeal found an implied contract to contribute to the PERS fund on an ongoing basis.

13 The facts in *California Teachers Association* presented a closer call, leading to a  
14 dissenting opinion. There, the Court of Appeal considered whether Government Code Sections  
15 23401 and 23402 manifested a clear intent to permanently fund the California Teacher’s  
16 Retirement Fund. 155 Cal. App. 3d at 499-500. Those statutes, passed in 1978, contained a table  
17 listing the specific amount of money to be paid into the Teacher’s Retirement Fund for every year  
18 from 1980 through 1995. *Id.* at 502 n.4. They also provided a formula for calculating funding in  
19 the ensuing years. *Id.*

20 The majority in *California Teachers Association* found that those tables constituted “a  
21 straight-out promise to pay fixed and determinable sums of money.” *Id.* at 508. It also  
22 considered the fact that the enactment creating the obligation expressly repealed the conditioning  
23 of such funding upon appropriations in the State Budget Act. *Id.* at 506. It concluded that this  
24 repeal demonstrated a “commitment to permanency of funding” regardless of the contingencies of  
25 the annual budget. *Id.* But in a well-reasoned dissent, Justice Regan stated that he “fully agree[d]  
26 with the Governor that the statutory appropriations . . . do not create a contract[.]” *Id.* at 515 (J.  
27 Regan, dissenting). Justice Regan distinguished *Valdes* because the statutory language in that  
28 case clearly stated that the State had a “continuing obligation” to contribute to the retirement

1 find, as no such language appeared in Sections 23401 and 23402. *Id.* at 517. Thus, he concluded  
2 that the statutes did not contain “an adequate manifestation of a promise giving rise to a  
3 contractual obligation.” *Id.* at 518-19.

4 On the other end of the spectrum are cases where courts have found *no* clear intent to enter  
5 into a contractual arrangement, despite a policy and practice of providing benefits. In *Claypool*,  
6 the Court of Appeal held that statutes authorizing funds for cost of living (“Cola”) programs did  
7 not create an implied promise of continued funding. 4 Cal. App. 4th at 652. The court’s pointed  
8 analysis flatly held that it could not find any statutory language assuring future funding, nor any  
9 language confirming that the legislature would not decrease funding. *Id.* at 679. There was  
10 simply no textual hook for the implied right.

11 The *Claypool* court distinguished *Valdes* and *California Teachers Association*, where the  
12 decisions had “implied contractual obligations . . . [based] on the strength of assurances to be  
13 found in the language of the governing statutes . . . [showing] a ‘commitment to permanency’ of  
14 funding of ‘critical importance’ to the ‘underlying contractual promise to pay the pensions[.]’”  
15 *Id.* at 670 (citing *Cal. Teachers Ass’n.*, 155 Cal. App. 3d at 506.) The statute at issue in *Claypool*  
16 did not include any assurances showing a commitment to permanency of funding. *Id.* The court  
17 further distinguished *Valdes* and *California Teachers Association* because the implied promises  
18 upheld in those cases were necessary to maintain the fundamental integrity of the pension system.  
19 *Id.* But in *Claypool*, plaintiff sought an implied right to a particular Cola funding methodology,  
20 which the court concluded amounted to a claim to “a vested right to control the administration of  
21 the plan[.]” *Id.* at 669. The court declined to imply such a right because it would place “a  
22 fundamental constraint on the freedom of action of the Legislature[.]” *Id.* at 670 (emphasis  
23 added) (citations and quotations omitted).

24 Likewise, the court in *Sappington v. Orange Unified School District*, 119 Cal. App. 4th 949  
25 (2004) declined to find that the retired employees of the Orange County unified school district  
26 had an implied right to receive free lifetime PPO benefits. *Id.* at 956. Unlike the *Claypool*  
27 plaintiffs, the *Sappington* plaintiffs did cite specific statutory language purportedly granting their  
28 implied right. *Id.* The court extensively analyzed this statutory language and concluded that it

1 was ambiguous. *Id.* at 955. The court then considered the fact that the District had a 20-year  
2 policy of providing the PPO benefits. *Id.* The court concluded that the District's decision to  
3 "provide[] a free PPO benefit for 20 years—before health insurance premiums skyrocketed and the  
4 cost of PPO coverage began far outpacing the cost of HMO coverage—does not prove the District  
5 promised to provide that option forever." *Id.* The long-term practice of providing the benefit  
6 "reflect[ed] a magnanimous spirit, not a contractual mandate." *Id.* at 955.

#### 8 4.1.3 Ninth Circuit Opinion in *Harris*

9  
10 *Harris*, the companion case to this one, recently returned from an appeal to the Ninth  
11 Circuit of an order dismissing the case. *See Harris*, 682 F.3d at 1134. It provides an instructive  
12 application of the California Supreme Court's certified decision.

13 In the relevant portion of *Harris*, the Ninth Circuit considered whether the retired  
14 employees could state a claim for breach of an implied contract to receive a fixed subsidy (the  
15 "Grant") under the 1993 Plan. *Id.* The Ninth Circuit found that "[i]n order to state a claim for a  
16 contractual right to the Grant, the Retirees must plead specific resolutions or ordinances  
17 establishing that right." *Id.* at 1135 (citing *Sonoma Cnty. Ass'n of Retired Emps. v. Sonoma*  
18 *Cnty.*, No. 09-04432, 2010 U.S. Dist. LEXIS 143345, at \*9, 27 (N.D. Cal. Nov. 23, 2010)  
19 (dismissing case with prejudice, where none of the Board resolutions or Board-certified MOUs  
20 "explicitly provide[d] that Sonoma agreed to provide health insurance benefits to retirees in  
21 perpetuity, [and so] a contract to do so has not been formed.")). In other words, the Plaintiffs  
22 needed to identify specific "terms or provisions . . . guarantee[ing] the Grant will continue." *Id.*

23 On appeal, Plaintiffs identified two specific MOUs to support their allegations. But the  
24 Ninth Circuit found that neither one had any terms or provisions guaranteeing the continuation of  
25 the Grant. *Id.* To the contrary, the MOUs contained durational language. *Id.* In the absence of  
26 any specific MOUs supporting the allegations of an implied right, the Ninth Circuit concluded  
27 that the "Retirees have failed to plead facts that suggest that the County promised, in the MOUs  
28 or otherwise, to maintain the Grant as it existed on the Retirees' respective dates of retirement."

1 *Id.* The absence of this factual predicate meant that Plaintiffs had not even properly *alleged* an  
2 implied right. The Ninth Circuit granted leave to amend, but only to allow Plaintiffs “to set out  
3 specifically the terms of those MOUs on which their claim is predicated.” *Id.* at 1137.

4 After reviewing the Ninth Circuit Opinion, the retired employees asked the Ninth Circuit  
5 to clarify that an implied contractual right to benefits could *also* arise from extrinsic  
6 “circumstances accompanying [the] passage [of the legislative enactment].” *Harris v. County of*  
7 *Orange*, No. 11-55669, slip op. at 3 (9th Cir. Jun. 12, 2012.) The Ninth Circuit refused, standing  
8 by its original Order requiring any amendment to cite *specific* MOUs. *Id.*, slip op. at 1 (9th Cir.  
9 Jul. 23, 2012.)

#### 10 11 **4.2 Application of REOC III**

12  
13 Ultimately, the California Supreme Court and the Ninth Circuit declined to weigh in on the  
14 proper outcome in this case, leaving it to this Court to apply the law to the facts. But in *REOC*  
15 *III*, the California Supreme Court did frame the relevant question as whether “a contractual right  
16 for the continuation of a single unified pool for purposes of setting health insurance premiums for  
17 retired Orange County employees can be implied from Board resolutions[.]” *REOC III*, 52 Cal.  
18 4th at 1188. REOC bears the “heavy burden,” *id.* at 1190, of demonstrating that “the statutory  
19 language or circumstances accompanying its passage clearly evince a legislative intent to create  
20 private rights of a contractual nature enforceable against the governmental body.” *Id.* at 1187  
21 (citations and quotations omitted). The Court bears in mind the California Supreme Court’s  
22 mandate, echoing the United States Supreme Court, to “proceed cautiously both in identifying a  
23 contract within the language of a . . . statute and defining the contours of any contractual  
24 obligation.” *Id.* at 1188 (citing *Nat’l R. Passenger Corp.*, 470 U.S. at 466).

##### 25 26 **4.2.1 Statutory Language and Accompanying Circumstances**

27  
28 The Court begins its cautious review by examining Resolution 84-1460, which originated

1 the pooling practice. It is immediately apparent that Resolution 84-1460 contains no provisions  
2 comparable to those in *Valdes* or *California Teachers Association*. Unlike the provision in  
3 *Valdes*, there is no language indicating that pooling would be a “continuing obligation.” *Valdes*,  
4 139 Cal. App. 3d at 778. And unlike the tables in *California Teachers Association*, the County  
5 did not mandate the future amounts that it was required to contribute to the retired employees’  
6 health care premium rates. 155 Cal. App. 3d at 502 n.4. In fact, Resolution 84-1460 does not  
7 discuss pooling or the Subsidy for *any* period of time beyond the 1985 calendar year. It simply  
8 included a bare-bones table listing the premium rates for that year. The rates for the next year  
9 were not fixed in advance, but were to be determined and approved the following year.

10 The circumstances accompanying the passage of Resolution 84-1460 suggest that it did  
11 not arise out of a bargained-for exchange with employees. Rather, the County independently  
12 realized that it needed to correct its past accounting mistake. To rectify this error, the County had  
13 to raise retired employee premiums by either 72% or 112%. The County elected to raise them by  
14 the still hefty 72%, which was only achieved by pooling rates, indirectly resulting in the Subsidy.  
15 The bottom line is that pooling was an immediate solution to an immediate problem. The  
16 Subsidy was a by-product of the County’s accounting clean-up. Nothing in Resolution 84-1460  
17 indicates that the County intended to grant a lifetime benefit to retired employees. In fact, the  
18 immediate effect of Resolution 84-1460 was to *harm* retired employees by raising their  
19 premiums.

20 The later legislation is also devoid of any language reflecting a continuing obligation to  
21 provide the Subsidy. The Board approved the pooling policy on an annual basis, and limited its  
22 approval to the upcoming calendar year only. The legislation made no commitment to the years  
23 beyond. This tracks facts found relevant in other cases. *See, e.g. San Bernardino Public Emps.*  
24 *Ass’n. v. City of Fontana*, 67 Cal. App. 4th 1215, 1224 (1998) (finding no vested right to benefits  
25 because they “were earned on a year-to-year basis under previous MOUs that expired under their  
26 own terms”). Indeed, the later Resolutions explicitly calculate the impact of discontinuing this  
27 policy.

28 Overall, the legislative language reflects the Board’s intent that the decision to continue

**EXHIBIT 4**

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6 UNITED STATES DISTRICT COURT  
 7 CENTRAL DISTRICT OF CALIFORNIA  
 8 SOUTHERN DIVISION  
 9

10  
 11  
 12 RETIRED EMPLOYEES  
 ASSOCIATION OF ORANGE  
 COUNTY,

13 Plaintiff,

14 vs.

15 COUNTY OF ORANGE.

16 Defendant.  
 17  
 18  
 19

Case No. SACV 07-1301 AG (MLgX)

[Related To Case No. SACV 09-0098; Appeal No. 11-55669]

**PLAINTIFF'S NOTICE OF  
 APPEAL FROM JUDGEMENT  
 IN FAVOR OF DEFENDANT;  
 NOTICE OF RELATED CASE**

1 Plaintiff appeals to the United States Ninth Circuit Court of Appeal from the  
 2 Judgment entered in favor of Defendant County of Orange after this Court's Order  
 3 granting Defendant's Motion for Judgment on the Pleadings. The Judgment was  
 4 filed August 31, 2012 and is Document No. 249 in the District Court's docket.  
 5 This case was previously appealed to the Ninth Circuit Court of Appeal (No. 09-  
 6 56026), and later remanded by that Court to the District Court after certification  
 7 proceedings before the California Supreme Court.

8 Pursuant to Ninth Circuit General Order 2.1, Plaintiff/Appellant provides  
 9 notice that this case is related to a case previously before the Ninth Circuit Court of  
 10 Appeal entitled *Gaylan Harris et al. v. County of Orange*, SACV 09-0098, Appeal  
 11 No. 11-55669. That case was returned to the District Court after reversal of that  
 12 Court's order granting judgment on the pleadings in favor of the Defendant, the  
 13 County of Orange, and is currently pending before the District Court.

14 Dated: September 6, 2012

Respectfully Submitted,

15 LAW OFFICE OF MICHAEL P. BROWN

16  
 17  
 18 By: /s/ Michael P. Brown  
 19 Michael P. Brown

20 Attorneys for Plaintiff

21  
 22  
 23  
 24  
 25  
 26  
 27  
 28



Office of the Clerk  
**United States Court of Appeals for the Ninth Circuit**  
 Post Office Box 193939  
 San Francisco, California 94119-3939  
 415-355-8000

Molly C. Dwyer  
 Clerk of Court

September 17, 2012

No.:	12-56706
D.C. No.:	8:07-cv-01301-AG-MLG
Short Title:	Retired Employees Association v. County of Orange

Dear Appellant/Counsel

A copy of your notice of appeal/petition has been received in the Clerk's office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number whenever you communicate with this court regarding this case.

Please furnish this docket number immediately to the court reporter if you place an order, or have placed an order, for portions of the trial transcripts. The court reporter will need this docket number when communicating with this court.

**The due dates for filing the parties' briefs and otherwise perfecting the appeal have been set by the enclosed "Time Schedule Order," pursuant to applicable FRAP rules. These dates can be extended only by court order. Failure of the appellant to comply with the time schedule order will result in automatic dismissal of the appeal. 9th Cir. R. 42-1.**

**Payment of the \$455.00 U.S. Court of Appeals docket fee is past due.** Appellant shall correct this deficiency **within 14 days**. Failure to respond to this order within the time set out will result in the dismissal of the appeal for failure to prosecute. See 9th Cir. R. 42-1. The fee is payable to the Clerk of the District Court, the Tax Court or the Bankruptcy Appellate Panel.

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**  
  
SEP 17 2012  
  
MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

RETIRED EMPLOYEES  
ASSOCIATION OF ORANGE  
COUNTY, INC.,

Plaintiff - Appellant,

v.

COUNTY OF ORANGE,

Defendant - Appellee.

No. 12-56706

D.C. No. 8:07-cv-01301-AG-MLG  
U.S. District Court for Central  
California, Santa Ana

**TIME SCHEDULE ORDER**

The parties shall meet the following time schedule.

If there were reported hearings, the parties shall designate and, if necessary, cross-designate the transcripts pursuant to 9th Cir. R. 10-3.1. If there were no reported hearings, the transcript deadlines do not apply.

**Mon., September 24, 2012** Mediation Questionnaire due. If your registration for Appellate ECF is confirmed after this date, the Mediation Questionnaire is due within one day of receiving the email from PACER confirming your registration.

**Tue., October 9, 2012** Transcript shall be ordered.

**Mon., January 7, 2013** Transcript shall be filed by court reporter.

**Tue., February 19, 2013** Appellant's opening brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.

**Thu., March 21, 2013**

Appellee's answering brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.

**The optional appellant's reply brief shall be filed and served within fourteen days of service of the appellee's brief, pursuant to FRAP 32 and 9th Cir. R. 32-1.**

**Failure of the appellant to comply with the Time Schedule Order will result in automatic dismissal of the appeal. See 9th Cir. R. 42-1.**

FOR THE COURT:

Molly C. Dwyer  
Clerk of Court

Jennifer Nidorf  
Deputy Clerk

**EXHIBIT 5**



Direct: 714-834-5835  
[COR LD NTC Dep County Counsel]  
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Santa Ana, CA 92702-1379

RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY, INC.,

Plaintiff - Appellant,

v.

COUNTY OF ORANGE,

Defendant - Appellee.

09/17/2012	<u>1</u> 14 pg, 487.92 KB	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Fee due from Appellant Retired Employees Association of Orange County, Inc. on 09/06/2012. Mediation Questionnaire due on 09/24/2012. Transcript ordered by 10/09/2012. Transcript due 01/07/2013. Appellant Retired Employees Association of Orange County, Inc. opening brief due 02/19/2013. Appellee County of Orange answering brief due 03/21/2013. Appellant's optional reply brief is due 14 days after service of the answering brief. [8325851] (JN)
09/24/2012	<u>2</u> 1 pg, 87.89 KB	Terminated Neelam Naidu for County of Orange in 12-56706 (per attached email). [8334590] (HC)
09/24/2012	<u>3</u> 4 pg, 386.49 KB	Filed (ECF) Appellant Retired Employees Association of Orange County, Inc. Mediation Questionnaire. Date of service: 09/24/2012. [8335082] (MPB)
10/03/2012	<u>4</u>	Received notification from District Court re: payment of docket fee. Amount Paid: USD 455.00. Date paid: 10/02/2012. [8346975] (BY)
01/25/2013	<u>5</u>	Filed (ECF) Streamlined request for extension of time to file Opening Brief by Appellant Retired Employees Association of Orange County, Inc.. New requested due date is 03/21/2013 at 12:00 am. [8488043] (MPB)
01/25/2013	<u>6</u>	Streamlined request [5] by Appellant Retired Employees Association of Orange County, Inc. to extend time to file the brief is approved. Amended briefing schedule: Appellant Retired Employees Association of Orange County, Inc. opening brief due 03/21/2013. Appellee County of Orange answering brief due 04/22/2013. The optional reply brief is due 14 days from the date of service of the answering brief. [8488771] (CG)
02/04/2013	<u>7</u> 1 pg, 330.6 KB	Filed (ECF) notice of appearance of Ernest J. Galvan for Appellant Retired Employees Association of Orange County, Inc.. Date of service: 02/04/2013. [8499420] (EG)
02/04/2013	<u>8</u>	Added attorney Ernest Galvan for Retired Employees Association of Orange County, Inc., in case 12-56706. [8499622] (JFF)
03/22/2013	<u>9</u> 8 pg, 36.19 KB	Filed (ECF) Appellant Retired Employees Association of Orange County, Inc. Motion to file oversized brief. Date of service: 03/21/2013. [8560483]-[COURT UPDATE: Attached corrected motion. Removed brief (refiled using correct ECF event; see entry: [16]). Resent NDA. 04/16/2013 by RY] (MPB)
03/22/2013	<u>16</u> 80 pg, 240.23 KB	COURT ENTERED FILING. Submitted (ECF) Opening Brief for review. Submitted by Appellant Retired Employees Association of Orange County, Inc.. Date of service: 03/22/2013. [8591953]-[COURT UPDATE: Attached corrected PDF of brief. Resent NDA. 04/16/2013 by RY] (RY)
03/22/2013	<u>10</u> 42 pg, 3.97 MB	Filed (ECF) Appellant Retired Employees Association of Orange County, Inc. Motion to take judicial notice of District Court Records Etc.. Date of service: 03/22/2013. [8561456]-[COURT UPDATE: Attached searchable version of motion. Resent NDA. 03/25/2013 by RY] (MPB)
03/25/2013	<u>11</u> 2 pg, 181.06 KB	Received Appellant Retired Employees Association of Orange County, Inc. excerpts of record in 8 volumes. Served on 03/25/2013. Deficiencies: incorrect color covers, motion to file oversized brief pending. Notified counsel (See attached notice). [8564003] (WP)
04/08/2013	<u>12</u>	Received corrected deficiency of Corrected color covers for the excerpts of record from Appellant Retired Employees Association of Orange County, Inc. served on. [8581655] (WP)
04/09/2013	<u>13</u>	COURT DELETED INCORRECT ENTRY. Notice about deletion sent to case participants registered for electronic filing. Correct Entry: [9]. Original Text: Filed (ECF) Appellant Retired Employees Association of Orange County, Inc. Motion to file oversized brief. Date of service: 04/09/2013. [8583922] (MPB)
04/16/2013	<u>14</u> 3 pg, 36.6 KB	Filed (ECF) Appellant Retired Employees Association of Orange County, Inc. Motion to extend time to file Opening brief until 03/22/2013 at 12:10 am. Date of service: 04/16/2013. [8591338] (MPB)
04/16/2013	<u>15</u> 1 pg, 22.93 KB	Filed order (Appellate Commissioner): The appellant's motion for leave to file an oversized brief is granted. The Clerk shall file the previously submitted opening brief. The answering brief is due within 30 days after the date of this order, and the optional reply brief is due within 14 days after service of the answering brief. (Pro Mo) [8591439]-[COURT UPDATE: Attached correct PDF of order. Resent NDA. 04/16/2013 by RY] (MS)
04/16/2013	<u>17</u> 1567 pg, 216.87 MB	Submitted (ECF) excerpts of record. Submitted by Appellant Retired Employees Association of Orange County, Inc.. Date of service: 04/16/2013. [8592136] (MPB)
04/16/2013	<u>18</u> 2 pg, 85.66 KB	Filed clerk order: The opening brief [16] submitted by Retired Employees Association of Orange County, Inc. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the excerpts of record [17] submitted by Retired Employees Association of Orange County, Inc. The excerpts are ordered filed. The Court has previously received paper copies of the excerpts. [8592215] (WP)
04/23/2013	<u>19</u>	Received 7 paper copies of Opening brief [16] filed by Retired Employees Association of Orange County, Inc.. [8600613] (SD)

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